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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

JUAN ANIBAL AGUIRRE-AGUIRRE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in reversing the decision of the Board of Immigration Appeals' determination that respondent is barred from eligibility for the relief of withholding of deportation under Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. 1253(h)(1), because there are "serious reasons for considering" that, prior to his arrival in the United States, respondent "committed a serious nonpolitical crime" within the meaning of Section 243(h)(2)(C) of the Act, 8 U.S.C. 1253(h)(2)(C).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	11
Conclusion	24
Appendix A	1a
Appendix B	12a
Appendix C	19a
Appendix D	33a
Appendix E	34a

TABLE OF AUTHORITIES

Cases:

Castro-O'Ryan v. *INS*, 847 F.2d 1307 (9th Cir. 1987) 17
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 14
Choeum v. *INS*, 129 F.3d 29 (1st Cir. 1997) 17-18
Deportation Proceedings for Joseph Patrick Thomas Doherty, 13 Op. Off. Legal Counsel 1 (1989), rev'd on other grounds, *Doherty* v. *INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992) 14, 19, 20, 22
Garcia-Mir v. *Smith*, 766 F.2d 1478 (1985), cert. denied *sub nom. Marquez-Medina* v. *Meese*, 475 U.S. 1022 (1986) 12, 17
Hamama v. *INS*, 78 F.3d 233 (6th Cir. 1996) 18
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) ... 2, 14, 16
INS v. *Stevic*, 467 U.S. 407 (1984) 4, 13
McMullen, In re, 19 I. & N. Dec. 90 (B.I.A. 1984) 18
McMullen v. *INS*:
658 F.2d 1312 (9th Cir. 1981) 19
788 F.2d 591 (9th Cir. 1986) 9, 10, 18, 19, 21, 22

Cases—Continued: Page

Ornelas v. *Ruiz*, 161 U.S. 502 (1896) 19
Pierce v. *Underwood*, 487 U.S. 552 (1988) 13
Ramirez-Ramos v. *INS*, 814 F.2d 1394 (9th Cir. 1987) 17
Rodriquez-Coto, In re, 19 I. & N. Dec. 208 (B.I.A. 1985) 15
Sale v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) 4, 13, 17
United States v. *Monsanto*, 491 U.S. 600 (1989) 15
Webster v. *Doe*, 486 U.S. 592 (1988) 13

Treaties, statutes and regulations:

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (*reprinted in* 19 U.S.T. 6259) 4
Art. 1, 19 U.S.T. 6264 16
Art. 1F(b), 19 U.S.T. 6264 ..... 5, 13, 16
Arts. 2-34, 19 U.S.T. 6264-6276 4
United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223 4
Art. I.2, 19 U.S.T. 6225 16
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214:
§ 413(f), 110 Stat. 1269 ..... 3, 4
§ 413(g), 110 Stat. 1269-1270 4
Illegal Immigration Reforms and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 ..... 2, 12
§ 305(a), 110 Stat. 3009-602 3
§ 307, 110 Stat. 3009-612 3
§ 604(a), 110 Stat. 3009-691 ..... 2, 3, 23
§ 604(c), 110 Stat. 3009-694 3
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A) 2
§ 104(a), 8 U.S.C. 1103(a) 17
§ 106(a)(4), 8 U.S.C. 1105(a)(4) 19
§ 208(a), 8 U.S.C. 1158(a) 2, 3

Statutes and regulations—Continued: Page

§ 208(b)(1), 8 U.S.C. 1158(b)(1) 2
§ 208(b)(2)(A)(iii), 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996) 3, 23
§ 212(a)(3)(B)(ii), 8 U.S.C. 1182(a)(3)(B)(ii) 7
§ 241(a)(1)(B), 8 U.S.C. 1251(a)(1)(B) 5
§ 241(b) (to be codified 8 U.S.C. 1231(b) (Supp. III 1997)) 4
§ 241(b)(3) (to be codified at 8 U.S.C. 1231(b)(3) (Supp. III 1997) 3
§ 243, 8 U.S.C. 1253 3
§ 243(h), 8 U.S.C. 1253(h) 3, 4, 13, 14
§ 243(h)(1), 8 U.S.C. 1253(h)(1) 3, 4
§ 243(h)(2), 8 U.S.C. 1253(h)(2) 17, 19
§ 243(h)(2)(B), 8 U.S.C. 1253(h)(2)(B) 17, 18
§ 243(h)(2)(C), 8 U.S.C. 1253(h)(2)(C) ..... *passim*
§ 243(h)(2)(D), 8 U.S.C. 1253(h)(2)(D) 7
Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 107 13
8 C.F.R.:
Section 208.14(a) 3
Section 208.14(b) 3

Miscellaneous:

62 Fed. Reg. 10,316 (1997) 2, 3
G. S. Goodwin-Gill, *The Refugee in International Law* (Clarendon Press 1983) 14, 19
United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol to the Status of Refugees* (Jan. 1988) 7-8, 9, 13, 16

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 121 F.3d 521. The opinions of the Board of Immigration Appeals (App., *infra*, 12a-18a) and the immigration judge (App., *infra*, 19a-32a) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 8, 1997. A petition for rehearing was denied

on November 26, 1997. App., *infra*, 33a. On February 17, 1998, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 26, 1998, and on March 17, 1998, she further extended the time for filing to and including April 25, 1998 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, as in effect when this case arose, 8 U.S.C. 1253(h), is set forth at App., *infra*, 34a-35a.

STATEMENT

1. Under the Immigration and Nationality Act of 1952 (INA), the term "refugee" means an alien who has "a well-founded fear of persecution" on account of the alien's race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A), 8 U.S.C. 1101(a)(42)(A). An alien who is found to be a refugee is statutorily eligible for asylum, but the decision whether to grant asylum to an eligible alien is "in the discretion of the Attorney General." INA § 208(a), 8 U.S.C. 1158(a).[1] See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987).

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[1] Section 208 of the INA was substantially revised by Section 604(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-691. Section 208(a), prior to its amendment by IIRIRA, provided that an "alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee." 8 U.S.C. 1158(a). Although Section 208(b)(1), as amended by IIRIRA, deleted the phrase "in the discretion of the Attorney General," the text of the amendment continues to delegate to the Attorney General the discretionary authority to grant or deny asylum. See IIRIRA § 604(a), 110 Stat. 3009-691 ("The Attorney General *may* grant asylum to an alien * * * if the Attorney General determines that such alien is a refugee.") (emphasis added). The current regulations further reinforce the discretionary nature of the authority, delegating it to specified subordinates of the Attorney General. 8 C.F.R. 208.14(a) and (b); 62 Fed. Reg. 10,316 (1997). The IIRIRA amendments also specify six categories of aliens who no longer may be granted asylum; one of those categories bars asylum for an alien "if the Attorney General determines that * * * there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." § 604(a), 110 Stat. 3009-691, 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996). That prohibition parallels the one at issue in this case for withholding of deportation. See pages 4-5, *infra*. The IIRIRA amendments to Section 208 apply to asylum applications filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694.

In addition, Section 243(h)(1) of the INA mandates the withholding of deportation of an alien to a country "if the Attorney General determines" that the alien's "life or freedom would be threatened" there on account of any of the five enumerated grounds. 8 U.S.C. 1253(h)(1).[2] In order to be entitled to withholding of

[2] Section 243 of the INA, 8 U.S.C. 1253, was revised in its entirety by Section 307 of IIRIRA, 110 Stat. 3009-612. Effective April 1, 1997, the provisions relating to withholding of deportation found in former Section 243(h) of the INA are now found in new Section 241(b)(3) (to be codified at 8 U.S.C. 1231(b) (Supp. III 1997)), as added by Section 305(a) of IIRIRA, 110 Stat. 3009-602. In this brief, we shall refer to the withholding of deportation provisions as they were set forth in former Section 243(h) of the INA, which applies to this case.

Prior to the enactment of IIRIRA, a new paragraph (3) was added to Section 243(h) of the INA by Section 413(f) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1269. That new paragraph (3) stated that, notwithstanding any other provision of

deportation under that provision, an alien must establish a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984). Section 243(h)(1) of the INA implements Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 (*reprinted in* 19 U.S.T. 6259). Although the United States is not a signatory to the Convention itself, in 1968 it acceded to the United Nations Protocol Relating to the Status of Refugees, Jan 31, 1967, 19 U.S.T. 6223, which bound the parties to comply with Articles 2 through 34 of the Convention, 19 U.S.T. 6264-6276. See *Stevic*, 467 U.S. at 416; *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993).

Paragraph (2) of Section 243(h) of the INA provides that the withholding relief available under paragraph (1) "shall not apply" to an alien "if the Attorney General determines," *inter alia*, that "there are serious

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law, paragraph (1) of Section 243(h) shall apply to an alien "if the Attorney General determines, in the discretion of the Attorney General," that (A) such alien's life or freedom would be threatened (on account of political opinion, etc.) in the country to which the alien would be deported, and (B) "the application of paragraph (1) to such alien is necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." 110 Stat. 1269. That amendment took effect as of the date of enactment (April 24, 1996) and applied "to applications filed before, on, or after such date if final action has not been taken on them before such date." AEDPA § 413(g), 110 Stat. 1270. The new paragraph (3) of Section 243(h) was inapplicable to this case because the final decision of the BIA was rendered on March 5, 1996 (App., *infra*, 12a), before the enactment of AEDPA. Paragraph (3) was not carried forward in the revision of the withholding of deportation provisions made by IIRIRA, which are now contained in Section 241(b) of the INA and became effective on April 1, 1997.

reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." 8 U.S.C. 1253(h)(2)(C). That exclusion from eligibility is based on a virtually identical exclusion in Article 1F(b) of the Convention, 19 U.S.T. 6264.

2. Respondent is a native and citizen of Guatemala. While a college student in his hometown, Jutiapa, Guatemala, he was a member and leader of the local student union, a group of about 100 students, called Estudiante Syndicato (ES). As a member of that group from 1989 to 1992, he personally participated in at least ten bus burnings to protest increases in bus fares and the Guatemalan government's seeming inaction in investigating the alleged disappearances of student leaders. Wearing masks to hide their identities, respondent and his cohorts stopped public buses and, when passengers did not cooperate by getting off, they stoned the passengers, hit them with sticks, or tied them up with ropes. The buses were then doused with gasoline and set on fire. In further protest against the government, respondent also vandalized privately owned shops, forcibly evacuating the stores by beating the customers, breaking windows, and destroying merchandise. App., *infra*, 13a-14a, 17a, 22a-23a.

3. Respondent entered the United States without inspection in 1993. App., *infra*, 20a. In 1994, pursuant to Section 241(a)(1)(B) of the INA, 8 U.S.C. 1251(a)(1)(B), the INS charged him with deportability for illegal entry. In November 1994, respondent appeared before an immigration judge and, through counsel, conceded deportability. App., *infra*, 20a. He applied for asylum and withholding of deportation, claiming that if he was returned to Guatemala he would be harmed on

account of his political opinions and related activities. *Ibid.*

After a hearing, an immigration judge granted respondent's applications for asylum and withholding of deportation, finding the requisite well-founded fear and threat of reprisal for his political activities. App., *infra*, 19a-32a. With respect to asylum, the immigration judge found that respondent was a refugee (and therefore statutorily eligible for asylum) because he was threatened with harm and death for his political protests, *id.* at 28a-30a, and the immigration judge exercised his discretion by granting respondent asylum because, in his view, respondent's favorable factors outweighed his criminal acts in Guatemala. *Id.* at 30a-31a. The immigration judge similarly found respondent entitled to withholding of deportation, finding a clear probability of persecution if he was returned to Guatemala, based on his political opinions as a student leader. *Id.* at 31a-32a.

4. The Board of Immigration Appeals (BIA) sustained the INS's appeal and ordered respondent deported to Guatemala. App., *infra*, 12a-18a.[3] The BIA held that respondent is ineligible for withholding of deportation under the "serious nonpolitical crime" exception in Section 243(h)(2)(C) of the INA. The BIA found that respondent's actions in Guatemala "were serious enough to affect the lives of innocent bus passengers, shop owners and their customers," and that the ES, of which respondent was a leader, "added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and

[3] Respondent never filed a brief with the BIA, although his request for an extension of time to file one was granted. Admin. R. 15-21.

beating civilians unwilling to cooperate." *Id.* at 17a. The BIA further concluded that "the criminal nature of [respondent's] acts outweigh their political nature," reasoning that although the ES "had a political agenda"—opposition to increased bus fares and seeming inaction in the investigation of student deaths—"[t]he ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a. Having found that respondent was barred from withholding of deportation because of his serious nonpolitical crimes in Guatemala, the BIA found no need to address the question of his threshold statutory eligibility for that relief—*i.e.*, whether he had established a clear probability of persecution if he was returned to Guatemala. *Ibid.*[4]

With respect to asylum, the BIA, without deciding respondent's statutory eligibility, denied asylum on discretionary grounds. App., *infra*, 17a-18a. The BIA concluded that "the nature of [respondent's] acts against innocent Guatemalans lead[s] us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum." *Id.* at 17a.

5. a. A divided panel of the court of appeals reversed and remanded to the BIA. App., *infra*, 1a-11a. Applying a *de novo* standard of review with respect to the BIA's interpretation of the statutory provisions governing eligibility for withholding of

[4] The BIA rejected the INS's argument that respondent's criminal actions in Guatemala constituted terrorist acts under Section 212(a)(3)(B)(ii) of the INA, 8 U.S.C. 1182(a)(3)(B)(ii), and that he therefore is a danger to the security of the United States, which constitutes a separate bar to withholding of deportation under Section 243(h)(2)(D) of the INA. App., *infra*, 17a.

deportation, *id.* at 3a, the court held that the BIA had committed three legal errors in finding respondent to be statutorily barred from withholding of deportation under Section 243(h)(2)(C). *Id.* at 4a-7a.

First, the court believed that the BIA had failed to weigh the criminal nature of respondent's acts against their political character. Relying on the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol on the Status of Refugees* (January 1988), prepared by the United Nations High Commissioner for Refugees (*UNHCR Handbook*), the court stated that it is necessary to consider whether the acts were "committed out of genuine political motives and not merely for personal reasons or gain," and whether there was "a close and direct causal link between the crime[s] committed and [their] alleged political purpose and object." App., *infra*, 4a-5a (quoting *UNHCR Handbook* ¶ 152). The court characterized respondent's acts of burning buses, vandalizing private property, and beating civilians with sticks as "crimes against property" and "minor assaults and batteries," *id.* at 4a, and it expressed the view that respondent and the ES had no personal motivation or gain. *Id.* at 5a. The court also expressed the view that "forceful measures" may be necessary to draw a government's attention to a protest when the government is an accomplice or accessory to terrorist measures. *Ibid.* Noting that respondent's tactics were successful in attracting the Guatemalan government's attention, the court found that the BIA "should have considered the political necessity and success of [respondent's] methods" in determining whether his actions were serious non-political crimes. *Id.* at 5a-6a.

Second, the court of appeals concluded that the BIA failed to consider whether respondent's crimes were "grossly out of proportion to the alleged objective" or involved "acts of an atrocious nature." App., *infra*, 6a (quoting *UNHCR Handbook* ¶ 152). The court compared respondent's acts to the conduct at issue in *McMullen* v. *INS*, 788 F.2d 591 (9th Cir. 1986), in which the Ninth Circuit sustained the BIA's determination that an alien was barred from withholding of deportation under Section 243(h)(2)(C) based on his involvement in "indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians." App., *infra*, 6a (quoting *McMullen*, 788 F.2d at 597). In the court's view, repondent's acts here "fall far short" of the kind of atrocities in *McMullen*. *Ibid.*

Third, the court of appeals held that the BIA "erred as a matter of law" in failing to consider the severity of the persecution that respondent might suffer if he is returned to Guatemala. App., *infra*, 6a. Quoting paragraph 156 of the *UNHCR Handbook*, which advises that "[i]f a person has well-founded fear of very severe persecution, * * * a crime must be very grave in order to exclude him," and citing respondent's testimony that he had received death threats because of his political activism, the court held that the BIA was required to balance respondent's admitted offenses in Guatemala against the danger to him of death if he is returned to that country. App., *infra*, 6a-7a.

b. The court of appeals likewise vacated the BIA's discretionary denial of asylum and remanded that issue for reconsideration by the BIA. App., *infra*, 7a. The court pointed out that the BIA based the denial of asylum "solely on [respondent's] activities as a

student in Guatemala." *Ibid.* Noting that it had found that the BIA had committed "errors of law" in its analysis of respondent's eligibility for withholding of deportation based on those same activities, the court remanded for the BIA "to reconsider whether [respondent] should be granted asylum." *Ibid.*

c. Judge Kleinfeld dissented. App., *infra*, 7a-11a. While acknowledging that respondent's crimes were not "atrocious," he pointed out that under *McMullen*, a crime need not be atrocious to bar withholding, because the mandatory bar is also triggered if the crime is "disproportionate to the objective." *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595). Here, Judge Kleinfeld reasoned, the BIA could indeed reasonably conclude, based on respondent's own testimony (which Judge Kleinfeld set out at length, see *id.* at 8a-10a) that respondent's crimes were disproportionate to his political objectives. *Id.* at 10a.

Judge Kleinfeld stressed that respondent's acts of stoning and beating civilians "were neither peaceful nor directed at the government" but rather "were violent, and directed at uninvolved people," App., *infra*, 8a, and he disagreed with the majority's characterization of "[b]eating people with sticks and stoning them" as "minor" assaults and batteries. *Id.* at 10a. He continued:

> It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. * * * The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, [respondent] sometimes forgot to mention that his group was also upset about disappearances.)

Id. at 10a-11a. Judge Kleinfeld then concluded: "The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs." *Id.* at 11a.[5]

REASONS FOR GRANTING THE PETITION

The court of appeals plainly erred in reversing the Board of Immigration Appeals' determination that respondent is statutorily barred from eligibility for withholding of deportation under Section 243(h)(2)(C) of the Immigration and Nationality Act (INA) because there are serious grounds for considering that he committed serious nonpolitical crimes in Guatemala. The BIA properly concluded that the criminal nature of respondent's activities—burning buses, beating and stoning innocent civilians and tying them with ropes, and vandalizing stores—outweighed whatever political component those activities might have had. In reversing the BIA's ruling and characterizing respondent's crimes as only "minor," the court of appeals substantially intruded upon the authority and judgment of the Attorney General in administering the INA and applying those provisions of the Act that govern the context-specific and often sensitive determination of whether an alien who engaged in criminal conduct abroad should be granted safe haven in this country.

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[5] On November 26, 1997, the court of appeals denied the INS's petition for rehearing and suggestion of rehearing en banc. App., *infra*, 33a.

The court of appeals' ruling that the Attorney General must balance the seriousness of the crime she has reason to believe the alien committed against the seriousness of the persecution he might face upon return finds no support in the text of Section 243(h)(2)(C) and disregards the BIA's authoritative interpretation to the contrary. It also squarely conflicts with the Eleventh Circuit's decision in *Garcia-Mir* v. *Smith*, 766 F.2d 1478 (1985) (per curiam), cert. denied *sub nom. Marquez-Medina* v. *Meese*, 475 U.S. 1022 (1986). The court of appeals' other rulings likewise fail to respect the BIA's judgment regarding the nexus and proportionality of criminal conduct to political objectives, and they improperly minimize an alien's violent acts against innocent civilians simply because those acts were thought to be "necessary" to get the attention of a foreign government and they turned out to have been "successful" in doing so. The humanitarian relief of withholding of deportation was not intended to reward such conduct aimed at innocent civilians.

The numerous errors by the court below will now be magnified in light of the amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which extends to asylum cases the same bar to relief based on serious grounds for considering that the alien committed a serious nonpolitical crime before coming to the United States. The Ninth Circuit's decision in this case therefore warrants review by this Court.

1. As an initial matter, the court of appeals erred in reviewing *de novo* the BIA's interpretation of the statutory provisions governing withholding of deportation, rather than deferring to the BIA's judgment. See App., *infra*, 3a. The BIA found respondent ineligible for withholding of deportation under Section 243(h)(2)(C) of the INA, based on the nature of his criminal activies in Guatemala. Deference to the judgment of the BIA, on behalf of the Attorney General, is especially warranted under that provision, because Section 243(h)(2)(C) bars an alien from eligibility if "the Attorney General determines" that "there are serious reasons for considering" that he committed a serious nonpolitical crime outside the United States. That formulation (as opposed to one that looks to whether the alien *did* commit a crime and whether that crime *was* nonpolitical) makes it clear both that the determination is for the Attorney General to make and that her *characterization* of the conduct (whether she finds "serious reasons for considering" it to be nonpolitical) is critical. See *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988); cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988).

The background of Section 243(h) reinforces that conclusion. Section 243(h) was enacted in the form applicable to this case in the Refugee Act of 1980 (Pub. L. No. 96-212, § 203(e), 94 Stat. 107), which basically conformed Section 243(h) to the United Nations Protocol and Convention Relating to the Status of Refugees. See *INS* v. *Stevic*, 467 U.S. 407, 421 (1984); *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 169 & n.19 (1993). The exclusion in Section 243(h)(2)(C) of the INA, at issue here, was drawn directly from a virtually identical exclusion in Article 1F(b) of the Convention, 19 U.S.T. 6264. See page 16, *infra*.

The *UNHCR Handbook* states (at ¶ 149) that the competence to decide whether the exclusions from eligibility for *nonrefoulement* apply rests with the contracting State in whose territory the alien seeks recognition of his refugee status, and it stresses that

that State need not have firm proof, only "serious reasons for considering," that a ground for exclusion exists. Furthermore, as the Attorney General explained in the administrative decision that was before this Court in *INS* v. *Doherty*, 502 U.S. 314 (1992), "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the function of characterization itself is [evidently] one in which political considerations will be involved." *Deportation Proceedings for Joseph Patrick Thomas Doherty*, 13 Op. Off. Legal Counsel 1, 23 (1989) (quoting G. S. Goodwin-Gill, *The Refugee in International Law* 35 (1983)), rev'd on other grounds, *Doherty* v. *U.S. Dep't of Justice, INS*, 908 F.2d 1108 (2d Cir. 1990), rev'd, 502 U.S. 314 (1992).

The origins of Section 243(h)(2)(C) thus heighten the degree of deference that would in any event be owed to the Attorney General's interpretation and application of Section 243(h) under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-845 (1984). See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication," in which "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program."). The BIA's decision here manifestly rests on a reasonable interpretation and application of Section 243(h)(2)(C), and it therefore should have been sustained by the court of appeals. Instead, reviewing the matter *de novo*, the court of appeals substituted its judgment for that of the BIA.

2. The court of appeals' disregard for the BIA's authoritative interpretation of Section 243(h)(2)(C) is reflected in its holding that the BIA must balance the severity of possible persecution against the seriousness of the criminal conduct in which the alien is believed to have engaged. App., *infra*, 6a-7a. The BIA has specifically rejected that approach under Section 243(h)(2)(C):

> [W]e reject any interpretation of the phrase * * * "serious nonpolitical crime" in section[] 243(h)(2) * * * (C) which would vary with the nature of evidence of persecution. We cannot find that the language and framework of section 243(h) supports such an approach, which would in effect transform a statutory exclusionary clause into a discretionary consideration. Moreover, it is presupposed that all persons barred from relief by the provisions of section 243(h)(2) can demonstrate a clear probability that their life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

In re Rodriguez-Coto, 19 I. & N. Dec. 208, 209-210 (B.I.A. 1985) (footnote omitted).

The court of appeals' balancing requirement also cannot be reconciled with the text of Section 243(h)(2)(C), which states that the provision for withholding of deportation in paragraph (1) "*shall* not apply to any alien" if the Attorney General has serious reasons for considering that the alien has committed a serious nonpolitical crime prior to arriving in the United States. 8 U.S.C. 1253(h)(2)(C) (emphasis added); see *United States* v. *Monsanto*, 491 U.S. 600, 607 (1989) ("shall" denotes a mandatory intent). By choosing to

cast the statutory bar to withholding in mandatory terms, Congress struck what it determined to be the appropriate balance; the court of appeals erred in directing the BIA to strike a different balance, taking into account the severity of possible persecution.

The mandatory nature of the exception to withholding also is consistent with the text of the Convention. The text of the statutory "serious non-political crime" exception in the INA is essentially the same as the text of the parallel provision of the Convention. Article I.2 of the Protocol, 19 U.S.T. 6225, states that the term "refugee" generally means any person within the definition of Article 1 of the Convention. In defining "refugee" in Article 1, the Convention in turn specifies that its provisions "shall not apply to any person with respect to whom there are serious reasons for considering that * * * (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee." Convention, Art. 1F(b), 19 U.S.T. 6264.

The court below relied on the *UNHCR Handbook* in holding that the BIA "erred as a matter of law" in failing to balance the seriousness of the crimes respondent committed against the seriousness of the persecution he might face. App., *infra*, 6a-7a. This Court, however, already has held that the *UNHCR Handbook* is not dispositive of legal issues arising under the INA. Although the *Handbook* is "useful in giving content to the obligations that the Protocol establishes," this Court has recognized that it does not have "the force of law or in any way bind[] the INS." *Cardoza-Fonseca*, 480 U.S. at 439 n.22. Rather, as we have explained above, it is to the Attorney General that Congress has assigned the authority and

responsibility to construe and administer the Act of Congress at issue here. See 8 U.S.C. 1103(a) (although the INA and other laws assign some responsibilities to other officers, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"); *Haitian Ctrs. Council*, 509 U.S at 171-173.

The Ninth Circuit's ruling on this point also creates a square conflict with the Eleventh Circuit's ruling in *Garcia-Mir* v. *Smith*:

> Plaintiffs' contention is based on their mistaken belief that before an alien may be denied withholding of deportation or asylum under 8 U.S.C. § 1253(h)(2) or 8 C.F.R. § 208.8(f), the agency must balance the degree of persecution which an alien will face if deported against the seriousness of the alien's past criminal activity. * * * Both this court and the INS have previously rejected the balancing test.

766 F.2d at 1487 n.10.[6] Resolution of this circuit conflict is important. If left uncorrected, the court of

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[6] The Ninth Circuit's holding below also is inconsistent with the recognition (both within and beyond the Ninth Circuit) that the other bars to withholding set forth in Section 243(h)(2) are mandatory and do not require any balancing of the severity of potential persecution against the seriousness of the crime. *E.g.*, *Ramirez-Ramos* v. *INS*, 814 F.2d 1394 (9th Cir. 1987) (expressly rejecting balancing test under Section 243(h)(2)(B), which bars relief for aliens who, having been convicted of a particularly serious crime, constitute a danger to the community of the United States; reasoning that Congress already struck the balance when it couched the statutory exception in mandatory terms); *Castro-O'Ryan* v. *INS*, 847 F.2d 1307, 1314 (9th Cir. 1987) (Section 243(h)(2)(B) exception for drug conviction is absolute bar to withholding); *Choeum* v. *INS*, 129

appeals' decision requiring application of a balancing test that the BIA has rejected would frustrate the Attorney General's ability to administer withholding of deportation uniformly across the country.

3. There likewise is no basis for the court of appeals' conclusion that the BIA committed other errors of law in determining that respondent is barred from eligibility for withholding of deportation under Section 243(h)(2)(C).

a. In *In re McMullen*, 19 I. & N. Dec. 90, 97-98 (B.I.A. 1984), the BIA identified factors it regarded as relevant in determining whether an alien's criminal acts constitute serious nonpolitical crimes:

> In evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective or if it involves acts of an atrocious nature.

The Ninth Circuit affirmed the BIA's decision in *McMullen*, concluding that "the BIA's interpretation of [Section 243(h)(2)(C)] is consistent with the Convention, and thus consistent with congressional intent." *McMullen* v. *INS*, 788 F.2d 591, 596 (9th Cir. 1986). The Ninth Circuit expressed the view that a crime may properly be regarded as a serious nonpolitical crime if the act lacks a genuine political motive, is not directed to modifying the political organization or structure of the state, lacks a direct causal link to the political purpose and object, is disproportionate to the objective, or is atrocious

F.3d 29, 40-43 (1st Cir. 1997) (applying Section 243(h)(2)(B)); *Hamama* v. *INS*, 78 F.3d 233, 238-240 (6th Cir. 1996) (same).

or barbarous. *Id.* at 595. The court of appeals in *McMullen* also rejected the contention that an act is a political crime as long as it is carried out during an insurrection or revolution, the act is incident to or furthers the political situation, and the motive is political. *Id.* at 596-597.

In *Deportation Proceedings for Joseph Patrick Thomas Doherty*, *supra*, the Attorney General, after again reviewing the relevant considerations, concluded that a crime "should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or it is 'of an atrocious or barbarous character.'" 13 Op. Off. Legal Counsel at 23 (quoting *McMullen*, 788 F.2d at 595 (quoting in turn Goodwin-Gill, *supra*, at 61)).

Application of the foregoing factors to a particular case in determining whether there is reason to consider a crime committed by an alien to be a serious nonpolitical crime largely presents questions of fact that are reviewed for substantial evidence. *Ornelas* v. *Ruiz*, 161 U.S. 502, 509 (1896) (whether a crime is a political offense is chiefly a question of fact); *McMullen* v. *INS*, 658 F.2d 1312, 1316 (9th Cir. 1981) ("factual findings under § 243(h)[(2)(C) of the INA] are subject to review under the substantial-evidence test"); INA § 106(a)(4), 8 U.S.C. 1105a(a)(4) (factual findings made by the BIA are to be reviewed for substantial evidence); INA § 243(h)(2), 8 U.S.C. 1253(h)(2) (providing that it is the Attorney General's "determin[ation]" that controls.)[7]

[7] A finding of "serious reasons for considering" that an alien has committed serious nonpolitical crimes under Section 243(h)(2)(C) is essentially a finding of probable cause. *McMullen*, 788 F.2d at 598 & n.2, 599.

b. In this case, the court of appeals failed to give due deference to the BIA's determination and improperly substituted its judgment in place of the BIA's factual finding that respondent had committed serious nonpolitical crimes. The BIA described in detail respondent's criminal conduct in Guatemala and acknowledged that he and the ES had a political agenda. App., *infra*, 13a-15a, 17a-18a. It determined, however, that the criminal nature of his acts "outweighed" their political character. *Id.* at 17a-18a. The BIA specifically found respondent's acts disproportionate to his stated political objective, concluding that "[t]he ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians." *Id.* at 18a. That finding makes it clear that there was no "close and direct causal link" (*Doherty*, 13 Op. Off. Legal Counsel at 23) between respondent's acts directed at ordinary, uninvolved civilians and his protest against the government and its official instrumentalities.

Thus, there is no basis for the court of appeals' view (see App., *infra*, 4a-5a) that the BIA did not consider the political objectives of respondent's conduct. Nor could the court reasonably conclude that the BIA failed to consider the connection between, and proportionality of, respondent's acts to his political objectives.

c. The court of appeals' also erred in holding that the BIA should have considered "the political necessity and success" of respondent's acts when determining the causal link of those acts to his political purpose and objective. App., *infra*, 5a. The court of appeals' focus on the necessity and success of the violent acts seriously distorted the "causal link" factor. The court seemed to believe that because respondent's methods proved to be successful (and perhaps necessary) in attracting the government's attention and the guerrillas' enmity, his violence against innocent civilians should be excused under this Nation's immigation laws. *Ibid.* The court cited no authority (and there is no such suggestion in the INA or the United Nations Convention) to support its holding that consideration of "the political necessity and success" of criminal acts is required as a separate factor in determining whether serious nonpolitical crimes have been committed.

Moreover, the court's focus on the "necessity and success" of the violent acts, when coupled with its particular emphasis on political motive, is inconsistent with the BIA's authoritative administrative interpretation, which focuses on the closeness of the causal link between the *nature* of the acts committed and the political objective sought. Instead, the court gave great weight to the fact that guerrilla warfare was ongoing, that respondent acted from a political motive, and that his actions were necessary to, and succeeded in advancing, his particular role in the rebellion. That is essentially the approach that was rejected by both the BIA and the Ninth Circuit itself in the *McMullen* case. See 788 F.2d at 596-597.

The court's "necessity and success" reasoning also ignores the difference between violent acts directed against ordinary citizens and such acts directed against official instrumentalities of the state. Under the court's approach, as long as the tactics are necessary to achieve the success of an ultimate political goal, the required causal link would be present, even though the acts are directed against innocent civilians. Here again, the court of appeals deviated from the BIA's articulation of the serious

nonpolitical crime standard. See also *McMullen*, 788 F.2d at 597-598 (violent acts against civilians are insufficiently linked to the political objective to qualify as political crimes).

d. Finally, the court of appeals erred in holding that the BIA should have considered whether respondent's crimes were atrocious. Under the BIA's approach, and the Attorney General's decision in *Doherty* (see 13 Op. Off. Legal Counsel at 23, quoted at page 14, *supra*), proportionality and atrociousness are alternative grounds on which a crime may be determined to be nonpolitical. Thus, acts that are solely disproportionate to the political objective or solely atrocious can constitute serious nonpolitical crimes, even if they are politically motivated. In this case, the BIA found that respondent's acts were not so atrocious as to rise to the level of terrorism, but it concluded that his violence against civilians was disproportionate to his political objectives. In contrast, the court of appeals equated "disproportionate" with "atrocious" and produced a test that, if carried to its logical conclusion, would require that an alien's acts amount to terrorism before the serious nonpolitical crime bar to withholding could be triggered. App., *infra*, 6a. As the dissent below recognized, that result is inconsistent with the Ninth Circuit's own precedent in *McMullen*: "[t]he crime need not, to exclude asylum, be 'atrocious' * * * if it 'is disproportionate to the objective.'" *Id.* at 7a-8a (quoting *McMullen*, 788 F.2d at 595).

4. The decision of the court of appeals warrants review by this Court. As we have explained above, the holding below that the Attorney General, before determining that an alien is barred from the relief of withholding of deportation under Section 243(h)(2)(C),

must balance the seriousness of the crime the alien committed against the severity of the persecution he may face squarely conflicts with the Eleventh Circuit's ruling in *Garcia-Mir* that no such balancing is required. Resolution of that conflict takes on added importance now because the "serious nonpolitical crime" bar to withholding of deportation has been extended by IIRIRA to asylum cases as well, beginning April 1, 1997. INA § 208(b)(2)(A)(iii), 8 U.S.C. 1158(b)(2)(A)(iii) (Supp. II 1996), as amended by IIRIRA § 604(a), 110 Stat. 3009-691. The other rulings by the court of appeals likewise impinge upon the authority of the Attorney General to determine the circumstances in which criminal conduct in another country should be considered to constitute a serious nonpolitical crime that gives rise to exclusion from eligibility for withholding of deportation (and, now, asylum). Those other rulings also inappropriately expand the availability of special humanitarian relief, including the mandatory relief of withholding of deportation, to persons who engage in violent conduct directed at innocent civilians.

Over the years, asylum and withholding of deportation have taken on increasing prominence under the INA. In November 1985, the INS's petition for a writ of certiorari in *Cardoza-Fonseca* noted (at 19 n.10) that in fiscal year 1984, 11,000 asylum applications were filed with the Executive Office of Immigration Review (EOIR). As of March 1998, there were nearly 33,800 asylum and withholding cases pending in EOIR. The availability of that relief to aliens who engaged in serious criminal activity before coming to this country therefore presents important issues in

the ongoing administration of the Nation's immigration laws.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1998

[8] After reversing and remanding the BIA's determination that respondent was barred from receiving the relief of withholding of deportation, the court of appeals vacated the BIA's discretionary denial of asylum and remanded that issue to the BIA for reconsideration as well. The court's only reason for doing so was that the BIA, in denying respondent asylum in the exercise of its discretion, had relied exclusively on his activities in Guatemala. App., *infra*, 7a. Because the court set aside the BIA's determination that those activities constituted serious nonpolitical crimes, the court apparently believed that it was appropriate for the BIA to reconsider its asylum decision in light of whatever revised determination it might make with respect to withholding of deportation. If this Court grants certiorari and reverses the court of appeals' holding on the withholding of deportation issue, the sole basis for the court of appeals' asylum ruling will necessarily be eliminated as well.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70267

JUAN ANIBAL AGUIRRE-AGUIRRE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Argued and Submitted May 7, 1997
Decided Aug. 8, 1997]

Before: PREGERSON, JOHN T. NOONAN, JR., and KLEINFELD, Circuit Judges.

NOONAN, Circuit Judge:

Juan Anibal Aguirre-Aguirre (Aguirre) petitions for review of the order of the Board of Immigration Appeals (the Board) finding him ineligible for withholding of deportation and asylum. Holding that the Board has erred as a matter of law in its interpretation of 8 U.S.C. § 1253(h)(2)(C) (1994) ("serious nonpolitical crime"), we grant the petition and remand.

PROCEEDINGS

Aguirre entered the United States without inspection. Before the Immigration Judge (IJ) he conceded deportability and applied for asylum and withholding of deportation. He testified to his activities in Guatemala as a student leader, among them the burning of ten buses and the messing up of several stores as a way of demonstrating against the ruling government of Guatemala and in particular against its raising of student fares on the buses (an element of student transportation) and its indifference to, and possible complicity in, the mysterious disappearances and deaths of political activists. Carefully reviewing Aguirre's testimony and finding it wholly believable, the IJ granted both asylum and withholding of deportation.

On appeal by the Immigration and Naturalization Service (the Service), the Board reversed. The Board disagreed with the Service's contention that Aguirre had engaged in terrorist acts as defined by 8 U.S.C. § 1182(a)(3)(B)(ii) (1994). The Board also disagreed with the Service's contention that Aguirre was a danger to the security of the country under 8 U.S.C. § 1253(h)(2)(D) (1994) and 8 C.F.R. § 208.14(c)(3). However, the Board held that the "nature of his acts against innocent Guatemalans" made him unworthy of a favorable exercise of discretion and that therefore it was unnecessary to address his statutory eligibility for asylum. The Board further held that "the criminal nature of the respondent's acts outweigh their political nature" and that he was consequently barred from withholding of deportation without the Board needing to address the issue of his statutory

eligibility for this relief. In reaching its decision the Board did not consider what Aguirre might suffer if deported to Guatemala, nor did the Board weigh the character of Aguirre's crimes in relation to his political objectives, nor did the Board follow Ninth Circuit precedent in this area. The Board also denied Aguirre voluntary departure.

Aguirre petitions for review.

ANALYSIS

This case depends upon the construction of a single statutory provision, 8 U.S.C. § 1253(h)(2)(C) (1994), declaring that an alien is not entitled to withholding of deportation if the Attorney General determines that "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." We review de novo the Board's interpretation of the requirements for establishing eligibility for withholding of deportation. *Abedini v. INS*, 971 F.2d 188, 190-91 (9th Cir. 1992).

The statute at issue here has been considered by us in *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986). Construing the statute, we found that Congress "intended the nonpolitical crimes exception to withholding of deportation to be consistent with the Convention [Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951)] and Protocol [Relating to the Status of Refugees, 19 U.S.T. 6223 (1968)]." *McMullen*, 788 F.2d at 595. The United States is a party to the Protocol, and the Protocol, Article 1.2, defines the term "refugee" as "any person within the definition of Article 1 of the Convention." The

relevant definition in Article 1F of the Convention excludes a person who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

In April, 1996 the Immigration and Nationality Act, 8 U.S.C. 1253(h), was amended by providing that an alien must be granted withholding of deportation if such grant was "necessary to ensure compliance with the 1967 United Nations Protocol Relating to the Status of Refugees." Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, § 413(f), 110 Stat. 1214, 1269 (1996) (adding 8 U.S.C. § 1253(h)(3)). It is unnecessary for us to determine whether this statute applies to Aguirre's case because under McMullen we are already bound to apply the Protocol in decisions regarding the withholding of deportation.

Interpreting and applying the statute in the light of *McMullen* and the Protocol, we find that the Board committed errors of law. First, the Board looked only at the offenses of Aguirre, which at common law would be considered crimes against property (the burning of the buses and the throwing of store merchandise on the floor) and minor assaults and batteries (the means taken to get reluctant bus passengers off the buses before their destruction). The Board did not consider these offenses in relation to Aguirre's declared political objectives. Under the Protocol the Board should have first determined the nature and purpose of Aguirre's acts, that is whether they were "committed out of genuine political motives and not merely for personal reasons or gain," as stated by an authoritative commentary on the Convention and Protocol. United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 152 (1979) [hereafter UNHCR, *Handbook*]. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39, 107 S.Ct. 1207, 1216-17, 94 L.Ed.2d 434 (1987) (relying on *Handbook* for definition of "refugee"). The Board should have further considered whether there is "a close and direct causal link between the crime[s] committed and [their] alleged political purpose and object." UNHCR, *Handbook*, *supra*, ¶ 152.

Aguirre's political purpose (there was no personal motivation or gain) was to challenge a government which there was reason to suspect engaged in the actual murder of its own citizens and which was certainly an accomplice in such murder by its failure to investigate the homicides and prosecute them. When you are dealing with an ass it may be necessary to move the beast by a blow on a sensitive part even though what you want to move are the feet. When you are dealing with a government which is an accomplice or an accessory to terroristic methods of government you need to use forceful measures to draw the government's attention to your protest; your political objective is a governmental response, you look for a sensitive area. Aguirre's methods, as he testified, were successful as to this objective. The government had to resort to television appeals to stop the student actions. The methods were also successful enough to earn the enmity of a rival rebel group, "the guerrillas," who resented the students' way of demonstrating against the government. The Board should have considered the political necessity and success of

Aguirre's methods, weighing their political character against their criminal content.

In making this inquiry the Board should have considered whether the acts committed were "grossly out of proportion to the alleged objective." UNHCR, *Handbook*, *supra*, ¶ 152. The political nature of the offenses would be "more difficult to accept" if they involved "acts of an atrocious nature." *Id.* The Board made its second error of law in failing to consider Ninth Circuit precedent in this regard. *McMullen* cast light on what under the law are acts of atrocious nature. They are the acts attributed to the Provisional Irish Republican Army (PIRA) which made McMullen ineligible for withholding of deportation, i.e., "indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians who disagreed with the PIRA's objectives and methods." *McMullen*, 788 F.2d at 597. A comparison of what the *McMullen* court found atrocious with the acts committed by Aguirre suggests a startling degree of difference. Aguirre did not engage in indiscriminate bombing, murder, torture, or the maiming of innocent civilians. His only acts against innocent Guatemalans were the disruption of some stores and his use of methods that we would all find objectionable if practiced upon us on a bus in the United States but which fall far short of the kind of atrocities attributed to McMullen and his associates.

Third, the Board erred as a matter of law in failing to consider the persecution that Aguirre might suffer if returned to Guatemala. "If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him." UNHCR,

Handbook, *supra*, ¶ 156. Aguirre testified without contradiction to the death threats that he and other student leaders had received and to the fact that several of the student leaders who had been threatened had been killed after he left the country. Aguirre could well be found to be in danger of losing his life if returned to Guatemala and therefore should be excluded for his crimes only "for the most serious reasons." Guy S. Goodwin-Gill, *The Refugee in International Law* 107 (2nd ed. 1996). The Board did not attempt to balance his admitted offenses against the danger to him of death if returned to his native land.

We review for abuse of discretion the Board's decision that Aguirre was undeserving of a favorable exercise of discretion on his claim for asylum. *Rodriguez-Matamoros v. INS*, 86 F.3d 158, 160 (9th Cir. 1996). The Board based its decision solely on Aguirre's activities as a student in Guatemala. Noting the Board's errors of law in its analysis of Aguirre's eligibility for withholding of deportation, we also remand for the Board to reconsider whether Aguirre should be granted asylum.

For these reasons we GRANT the petition and REMAND to the Board.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

The BIA correctly identified the legal question, whether "the criminal nature of the respondent's acts outweigh their political nature." The crime need not, to exclude asylum, be "atrocious" (and Aguirre-Aguirre's was not) if it "is disproportionate to the

objective." *McMullen v. INS*, 788 F.2d 591, 595 (9th Cir.1986). Because the BIA opinion analyzes the question as the majority opinion says it should, the majority cannot (and does not) point to legal error. The issue is entirely one of weighing Aguirre-Aguirre's crimes against his political objectives.

Aguirre-Aguirre testified in support of his asylum claim that his) political purpose was to protest the high bus fares, and also to protest government failure to investigate disappearances and murders. The actions he took were neither peaceful nor directed at the government. They were violent, and directed at uninvolved people. Here is Aguirre-Aguirre's own description, worth reading in full, on cross examination by government counsel, of the criminal activities of which he was a leader:

> . . . we burned buses . . . . splashing with gasoline and then burned them and then burned the tires and all.
>
> Q. And were there any people on board these buses when you did this?
>
> A. No, because we would stop the bus, help all the people get out of the bus, and then because there were so many, we would just stone them and make them get away and then burn the bus.
>
> Q. To your knowledge, was anyone hurt during any of these bus burnings or stonings?
>
> . . . . .

> A. No, we just hit them if they did not want to get off the bus.
>
> Q. How did you hit them? Did you strike them with a club, or how?
>
> A. We would have sticks, you know, to hit them with, or we would just tie them with ropes. But, if they be, I mean, if they hit our, uh, bus then we get off the bus.
>
> Q. And, these people who were on the bus were just ordinary citizens of Guatemala?
>
> A. Yes.
>
> . . . . .
>
> Q. When you were burning these buses and throwing rocks and things at people, did you cover your face with a bandanna or in some other way hide your identity?
>
> A. Yes, we would cover our faces.
>
> Q. And during the times that you burned the buses, you say you also broke windows and other things?
>
> A. Yeah, we would break the windows of the stores and we would just take, I mean, uh, raid the stores. Taking everything they have.
>
> Q. So, you were, in other words, looting the stores?

A. No, we did not steal from the stores. We simply took the people out of the stores that were there. And we would throw everything on the floor.

Q. The people who were in the stores, did you treat them in a similar fashion that you treated the people on the bus, that is, throw rocks at them and hit them with sticks and tie them with ropes in order to get them to go?

A. If they did not try to do anything to us, we would not do anything to them. Because, we would always explain to the people who were there in the buses, for instance, why we were doing this and why we were protesting and doing these things, because of the high fares that the buses had. Some of them would even support us.

Could the BIA reasonably conclude that Aguirre-Aguirre's crimes were disproportionate to his political objectives? Yes indeed.

My colleagues read the evidence as "crimes against property" combined with "minor assaults and batteries." Beating people with sticks and stoning them, does not seem "minor" to me. Hitting someone on the head with a stick in the nature of a baseball bat or a stone in the nature of a brick is reasonably likely to cause brain damage. It is hard to imagine a band of masked young men, angry enough to burn buses, being especially gentle and kind as they stone people, hit them with "sticks," and tie them up. There is no reason to suppose that the sticks were like the

flexible yardsticks one gets for free at the hardware store, as opposed to baseball bats. The bus passengers, perhaps travelling to work or going home exhausted at the end of hard days, probably would not interrupt their journeys for a bunch of angry boys with little sticks. The shopkeepers, not their inanimate inventory, were the victims of having their stores trashed. Nor is it evident to me why burning buses and trashing stores is proportional to a protest largely directed at bus fares. (When he testified, Aguirre-Aguirre sometimes forgot to mention that his group was also upset about disappearances.)

Asylum law is supposed to protect innocent victims of persecution. We grossly distort it by requiring the government to give asylum to violent criminals. The United States should be a haven for innocent people fleeing persecution. It should not be a haven for thugs.

APPENDIX B

File: A70 815 341-Las Vegas Date: March 5, 1996

IN RE: JUAN ANIBAL *AGUIRRE*-AGUIRRE

Filed: Mar. 5, 1996

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Joseph W. Long, Esquire
530 South Fourth Street
Las Vegas, Nevada 89101

ON BEHALF OF SERVICE:

Richard Knuck
General Attorney

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)]
Entered without inspection

APPLICATION: Asylum; withholding of deportation

In a decision dated April 5, 1995, the Immigration Judge found the respondent deportable as charged, and granted his applications for asylum and withholding of deportation. The Service has appealed. The request for oral argument before the Board has been withdrawn. The appeal will be sustained.

FACTUAL BACKGROUND

The respondent is a 26-year-old native and citizen of Guatemala who entered the United States without inspection in January 1993 (Tr. at 10; Exhs. 1, 2). He has conceded deportability (Tr. at 5-6). His asylum request is based on his belief that he will be harmed in Guatemala (Tr. at 32; Exh. 2).

From 1989 until 1992, the respondent was a member of the student union at his college, the Estudeante Syndicado (ES), and was in charge of promoting student strikes (Tr. at 11-12). These strikes were prompted by government actions including raising bus fares for students and failing to investigate the deaths of students (Tr. at 12-13, 35).

The ES protests included "burning buses, breaking windows or just attacking the police, police cars." The respondent estimated that he assisted in burning approximately 10 buses. He testified that his group would stop the bus and escort the passengers off. The ES would "just stone them" or "just hit them if they did not want to get off the bus." The students "would have sticks . . . to hit [the passengers] with or we would just tie them with ropes." The ES also "trashed" some stores after removing the customers (Tr. at 13, 33-35). During these protests, the respondent's identity was hidden (Tr. at 35-36).

The respondent testified that when he watched television, students were being asked "to calm the situation" and resist involvement in the strikes. He

was unsure if the government knew of his involvement in the strikes, but he knew the government had a list of all college students and their activities (Tr. at 14). The respondent also noted that if the police found out about his involvement with the ES strikes, "they will get a judicial order and come and get [him]" (Tr. at 40).

The respondent began to receive anonymous notes telling him that the ES should halt their activities or face "whatever the consequences would bring." Two of the threatening letters were on government stationary, but unsigned, according to the respondent. Some of the letters stated that the leadership of the ES would "disappear" if the group did not cease its violent protests (Tr. at 14-15). The respondent testified that between 1989 and 1992, five ES members were killed. He suspected Guatemalan guerrillas in one incident, and the government in the other incidents (Tr. at 21-22, 24).

The respondent testified that in June or September 1992, he and a friend of his were approached by three armed men who he identified as guerrillas. The men told them that the ES had to cease their protests or "the consequences would be very bad." They also asked for the support of the ES "because they did not want to have any competition from any other group" in causing mayhem (Tr. at 22-24, 37).

The respondent testified that an uncle of his was kidnapped by the guerrillas. The respondent surmised that he was murdered by his captors because they found his military identification. The respondent acknowledged that the guerrillas were unaware

of his familial relationship with his uncle (Tr. at 25). The respondent also testified that he spent a year in Guatemala's military reserves, and fears that the guerrillas would kill him if he was caught with his military identification (Tr. at 26).

The respondent was also active with the National Central Union (NCU), a political party. He was in charge of "celebrations of the party and . . . protests against the government." He also helped organize rallies and recruit new members (Tr. at 26-27). The respondent testified that in December 1992 a member of the Guatemalan congress told him that he should cease his NCU activities or "count on the consequences." The respondent believed this statement constituted a threat to his safety, though he did not quit the UCN (Tr. at 27-28). The respondent noted that the leader of the UCN was assassinated and two of his bodyguards wounded in 1993 (Tr. at 29).

The respondent decided to leave Guatemala when another acquaintance of his in the Guatemalan congress told him that the government was planning to assassinate some students. This person thought the respondent might be among them (Tr. at 29-30, 38). The respondent is unaware if the killings ever took place, though he heard on the news that an ES leader had been killed (Tr. at 30, 38-39).

Since he has arrived in the United States, the respondent has been contacted by a former school director from Guatemala. The director told him that unidentified persons were looking for him. The respondent believes these persons could be from the

government, the guerrillas, or "a secret group that the government has" (Tr. at 30-31).

THE IMMIGRATION JUDGE'S DECISION AND THE RESPONDENT'S POSITION ON APPEAL

The Immigration Judge found that the respondent had established eligibility for a grant of asylum and for withholding of deportation based on his fear of reprisal for his political activities. He also dismissed the Service's contentions that the respondent's acts with the ES constituted crimes that triggered an automatic bar to relief from deportation.

On appeal, the Service argued that the respondent's activities were terrorist acts. It also argued that the respondent failed to establish a well-founded fear of persecution in Guatemala.

APPLICABLE LAW

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). He must also demonstrate that he should be granted asylum as a matter of discretion. *See* section 208 of the Act, 8 U.S.C. § 1158; *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

In order to establish eligibility for withholding of deportation, an alien must demonstrate that his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act, 8 U.S.C. § 1253(h)(1). The alien is barred

from establishing eligibility if "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." Section 243(h)(2)(C) of the Act, 8 U.S.C. § 1253(h)(2)(C). We have held that "[i]n evaluating the political nature of a crime, we consider it important that the political aspect of the offense outweigh its common-law character. This would not be the case if the crime is grossly out of proportion to the political objective . . ." *Matter of McMullen*, 19 I&N Dec. 90, 97-98 (BIA 1984), *aff'd*, 788 F.2d 591 (9th Cir. 1986).

ANALYSIS AND CONCLUSIONS

The record reflects that the respondent engaged in demonstrations against the Guatemalan government that were serious enough to attract the attention of the government and the guerrillas in that country. They were also serious enough to affect the lives of innocent bus passengers, shop owners and their customers. The ES added to the violent atmosphere in Guatemala by burning buses, destroying shops, and stoning, binding, and beating civilians unwilling to cooperate.

We disagree with the Service's contentions that the respondent has engaged in terrorist acts under section 212(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(30(B)(ii), and that he is a danger to the security of the United States. However, the nature of his acts against innocent Guatemalans lead us to find that he is unworthy of a favorable exercise of discretion for a grant of asylum. Consequently, we do not need to

address the respondent's statutory eligibility for asylum. *See INS v. Bagamasbad*, 429 U.S. 24 (1976).

We also find that the criminal nature of the respondent's acts outweigh their political nature. The respondent testified that the primary source of their displeasure from the government arose from its seeming inaction in the investigation of student deaths and in its raising of student bus fares. The ire of the ES manifested itself disproportionately in the destruction of property and assaults on civilians. Although the ES had a political agenda, those goals were outweighed by their criminal strategy of strikes violent enough to attract the attention of the main combatants in the Guatemalan conflict. Consequently, we find that the respondent is barred from withholding of deportation and do not need to address the issue of his statutory eligibility for this relief.

The Immigration Judge did not rule on the matter of voluntary departure, not did the respondent testify regarding his statutory eligibility for such relief. Our review of the record indicates that even if the respondent were statutorily eligible for such a grant, for the reasons discussed above, we would deny it in the exercise of discretion.

ORDER: The appeal is sustained.

FURTHER ORDER: The Immigration Judge's order granting asylum and withholding of deportation is vacated and the respondent is ordered deported from the United States.

signature illegible
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
NEW YORK, NEW YORK

File No.: A 70 815 341

IN THE MATTER OF JUAN ANIBAL AGUIRRE AGUIRRE,
RESPONDENT

Filed: April 5, 1995

IN DEPORTATION PROCEEDINGS

CHARGES: Entry without inspection.

APPLICATIONS: Political asylum, withholding of deportation and voluntary departure.

ON BEHALF OF RESPONDENT:

Joseph W. Long, Esquire
530 South 4th Street
Los Vegas, Nevada 89101

ON BEHALF OF SERVICE:

Richard H. Knuck, Esquire
General Attorney, INS
Phoenix, Arizona

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 25-year-old male alien native and citizen of Guatemala who has admitted entering the United States without inspection near San Ysidro, California on January the 23rd, 1993. He was placed in deportation proceedings with issuance of an Order to Show Cause dated June the 22nd, 1994. At this proceeding, through counsel, he has admitted the factual allegations, conceded deportability and declined to name a country of deportation. Accordingly the Court will designate his country of nationality, Guatemala. Based upon the respondent's admissions deportability has been established by clear, convincing, unequivocal evidence. *Woodby v. INS*, 385 U.S. 276 (1966), 8 C.F.R. Sec. 242.14A.

Respondent has submitted an application for political asylum in which he claims he will be persecuted in Guatemala, because of his political opinions and activities there as a student leader.

An application for political asylum under Section 208 of the Act, 8 U.S.C. Sec. 1158 made after the institution of deportation proceeding shall also be considered as a request for withholding of deportation under Section 243(h)(1) of the Act, 8 U.S.C. Sec. 1253(h)(1), see 8 C.R.F. (*sic*) or [C.F.R.] Sec. 208.3B. To be eligible for political asylum, the respondent must establish that he has a well-founded fear of persecution on account of race, religion, nationality, membership in particular social group, or political opinion. *INS v. Elias-Zacarias*, 112 Supreme Court 812 (1992). On a case by case basis the asylum seeker must establish by objective evidence that persecution is a reasonable

possibility, see *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). An applicant for asylum under Section 208 of the Act has established a well-founded fear if a reasonable person in his circumstances would fear persecution or if he has been a victim of past persecution. *Matter of Chen*, Int. Dec. 3104 (BIA 1989). A reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable, *Matter of Mogharrabi*, Int. Dec. 3028 (BIA June 1987), *Cardoza-Fonseca*, supra. Relief of political asylum under Section 208 is discretionary in nature. The alien must show that the alien possesses a belief or characteristic a persecutor seeks to overcome by means of punishment. The persecutor could become aware that the alien possess this belief or characteristic. The persecutor has the capability of punishing the alien. And the persecutor has an inclination to punish the alien. *Id.* at 11.

To be eligible for withholding of deportation under Section 243(h)(1) the respondent must, by a preponderance of the evidence, establish that his life or freedom would be threatened on the account of his race, religion, nationality, membership in a particular social group, or political opinion. Relief under this Section is mandatory in nature, *see Matter of Acosta*, Int. Dec. 2986 (BIA 1985), *INS. v. Stevic*, 467 U.S. 407 (1984). The respondent has submitted some various and sundry documentary evidence to include a letter from the director of his former university as well as other general country reports. The Court has considered that evidence in arriving at a decision in this case and will reference the letter later on. The respondent has also testified fully under oath before the Court in support of his application for political

asylum. He does testify that he does fear that he will be persecuted and killed if returned to Guatemala because of his political opinions and activities as a student leader in the university there in Guatemala.

In summary, his testimony is substantially as follows: that he was born in Guatemala October the 20th, 1969 and is 25 years of age. He lived his entire life in the same place in Guatemala before coming to the United States. He was a university student there studying accounting and did receive a degree, presumably in accounting, and worked for about a month as an accountant.

He was active in various student groups, to include the Syndicado, a nationwide student movement, from 1989 to 1992. He was in a leadership position and coordinated demonstrations and other activities of that group. And he promoted student strikes and disseminated information. He indicates there were a total about 22 associations under this group for a total of about a thousand people. When students were killed, when there were human rights violations and when the government took acts they did not agree with they would demonstrate. This included burning cars and buses, breaking windows of stores, throwing merchandise on the floor and attacking the police. He, himself indicates he participated in the burning of about 10 buses. The buses would be stopped, emptied of people, and if the people refused to leave they would be forcibly removed. Also in the stores the people would be asked to leave. If they did not leave they wold be forcibly removed before the store was essentially trashed. He indicated they always were masked and could not be identified by the police. And they

always explained to the people their cause, and in many cases the people supported them. He indicated that in particular they demonstrated when students were murdered and there was never an investigation or any actions taken by the government. Also some of their demonstrations occurred over the high cost of bus fares for students. He indicates the government was aware of this student group and movement, because he often saw TV appeals from the government asking the students to cease and desist such demonstrations and protests. He also indicates that the government is provided a list of all university and college students by the universities and colleges. And they from that list identify those who are outstanding leaders in the student movements. He does believe that his name is on the list, that it was provided by the director of the college, and that he is identified by the government as a student leader.

He indicates he has been threatened by three different groups, it appears, the guerrillas, the government of Guatemala, as well as right wing government support groups. He indicates that some of these threats were anonymous and he does believe they were from the government or government support right wing groups. These threats apparently were in writing, delivered to him, directing or threatening that they should stop their activities and be more peaceful or action would have to be taken against them. He understood that this was directed to the outstanding leaders on the list, that they were to stop the activities themselves and coordinating it for the student body. He indicates he received multiple threats of this nature, all in the same vein. Some of the threats said that the leaders of the student movement would

disappear unless they heeded the advice and ceased and desisted their activities. The last two threats he received were on government letterhead and said "official," but they were not signed by any person in particular. Hence, anonymous. One of the reasons he believed they were threats from the government or right wing government support groups is because they were on government letterhead.

He was also involved in the student body, the directorate, he was a vice-president of that organization for approximately six years. He worked with the faculty of the university. He received information, disseminated it to the students. He took student complaints and problems to the faculty for formal resolution. Basically he was in charge of seeing that everything at the college was maintained in order. He also notified the students in this capacity regarding demonstrations times, dates, and places, but was not in charge of the organization or execution of those demonstrations as vice-president of the student body. This group was strictly a local university college group and they were concerned with local college matters as opposed to the Syndicado. He indicates that his leadership position in both organizations was widely known and that the link between the Syndicado and the Directive was well known also.

He indicates that Syndicado members were harmed while he was there. Five members were found dead in different locations within a period of six months between 1989 and 1992. One student was kidnapped, a member of the Syndicado, and later found dead. He read about these deaths in the newspapers. The government apparently claimed that they were com-

mitted by the guerrillas, however he believes and the Syndicate believes, that the government was responsible for their deaths, because they refused to investigate or take any action regarding the discovery of the corpses.

He indicates that the guerrillas had infiltrated their group and were aware of their activities and the identity of the leaders, to include himself. In fact, he indicates, that in June or September of 1992, he and a friend were at a football field when three armed men in uniform came and told them to stop their activities or face the consequences and they were told that those consequences would be quite bad. They were readily identifiable as guerrillas. They were armed and in uniform. While the government and guerrilla soldiers wear the same uniform, they are distinguishable from their head gear. While the government military soldiers wear hats, the guerrillas wear bandannas. These three men did wear bandannas and were hence, guerrillas. These men asked the respondent to join them, the guerrillas, for a united effort. They did not want competition from the Syindacato or the student movement. He perceived the conversation of the guerrillas to mean that unless he joined with them, the Syindacato and the guerrillas united, that he would be killed. He indicated he refused to do so.

He does have a relative who was harmed by the guerrillas, and uncle was killed by the guerrillas. He had returned from the United States and went to the border with Mexico to pick up his car when he was kidnapped by guerrillas and upon discovering that he was carrying a military identification card he was killed and later his body was discovered.

He, himself, joined the military reserves and trained some three times a week, 12 times a month, and at the end of the school year would actually serve active duty for three moths. He indicated in total, he served on active duty for about one year. He indicates while this caused him no problems while he was in Guatemala, he was aware that if the guerrillas ever stopped him and found the military ID on his person that would result in his death. However, this never occurred and to the best of his knowledge apparently the guerrillas were not aware of that status.

He also was a member of the National Central Union (UCN), a political party there in Guatemala. And he was a very active member. He was in charge of party celebrations and rallies and protests against the government. He organized these activities and also helped recruit new members. On one occasion, December the 20th, 1992, he was threatened by a government official in another political party due to his activities for the UCN. He indicates this person was a member of the congress. And this person told him to stop his recruiting for UCN party and to come join this official's party, himself, or he would suffer the consequences. The respondent indicated that he took this as a threat because this was a high government official, feared by everyone. And he thought he would be harmed and that the government official would carry out that threat. In fact, he does indicate that in 1993, the leader of the UCN party was assassinated and some of his bodyguards injured. This assassination was never investigated by the government.

Finally, on January the 7th, 1993, he departed Guatemala and came to the United States. He made this decision to leave his country when a friend of his, who was a member of congress, told him that the government was planning to kill some student leaders and that he might be on the list. His friend was a high-ranking politician and knew about such matters. He believed him. This friend, this high politician, told the respondent of this because the respondent played football on a team he owned and because they were very good friends. After leaving Guatemala, from a newspaper in California, he did read that tone of the student Syindacato leaders was killed. While not from his department, from that same area. Four of the student leaders fled Guatemala January the 7th, 1993 or thereabouts as a result of this warning from the respondent's friend.

Also, after his arrival in the United States he received a letter from the director of the university, that is part of Exhibit 2 in the record of these proceedings. The director obtained his address from his family and wrote to tell him that he should stay in the United States because unidentified people had been to the University looking for the respondent. The respondent believes that they are either government or guerrilla officials, because no one else there would have any interest in finding him. And he believes that their—the government or guerilla—interest is because of his activities and political opinion as a student leader.

His family remains in Guatemala. He, himself, is unwilling to return to that country, because he fears that if he is returned the government is looking for

him as an important member and student leader and would persecute and otherwise do him harm. He also believes the guerrillas would harm him if they discovered his military affiliation.

I have observed the testimony and the demeanor of the respondent and I do find him to be a credible witness worthy of belief.

Under Section 208 of the Act, an alien may be granted asylum in the exercise of discretion if he qualifies as a refugee within the meaning of Section 101(a)(42)(A) of the Act, 8 U.S.C. Section 1101(a)(42)(A). That section does define refugee as an alien who is unable or unwilling to return to his home country because of persecution or a well-founded fear of persecution on the account of race, religion, nationality, membership in a particular social group or political opinion. The alien does bear the burden of proof to establish a well-founded fear of persecution by a preponderance of the evidence, *Matter of Acosta, supra.*, a *Matter of Exilus*, 18 I&N Dec. 276 (BIA 1982), 8 C.F.R. Section 236.3 and 242.17. *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5gh Cirs. 1982). The alien must demonstrate a likelihood that he individually will be singled out and subjected to persecution, see *Fleurinor v. INS*, 585 F.2d 129 (5th Circ. 1978).

The showing of a well-founded fear of persecution requires that the alien present some subjective evidence which establishes a realistic likelihood of persecution in his home land. An alien's own testimony in an asylum case may be sufficient without corroborataive evidence to prove a well founded fear of

persecution where that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear *Matter of Mogharrabi, supra.* Otherwise stated, the test is where the evidence of record has a solid in objective facts or events which is significantly probative of the likelihood of persecution of this particular alien sufficient to establish a well-founded fear of persecution in Guatemala. *Matter of Acosta, supra. Matter of Exame*, 18 I&N Dec. 303 (BIA 1992). *Matter of Siburn*, 18 I&N Dec. 354 (BIA 1983). *INS v. Stevic, supra. INS v. Cardoza-Fonseca, supra.* *See* also *Matter of Sanchez and Escobar*, Int. Dec. 2996 (BIA 1985).

The Court does find that there is sufficient evidence to show that the respondent has a well-founded fear of persecution within the meaning of Section 208 of the Act. In this regard there is objective evidence of record that he was very much involved as a student leader and in political opinion and in political activities and that he did receive threats from the guerrillas because of this political opinion and activities. Also from what appears to be the government and/or government right wing support organizations. He is fearful for his safety because of these threats. The guerrillas are able to carry out such threats as they please with impunity. The government is unable to provide protection for the respondent from such groups nor are they willing to investigate or take any actions once such threats are carried out. On the other hand, the government itself has threatened the respondent. He believes that five members of the Syindacato were killed by the government, because they refuse to investigate the deaths. Even if they

were killed by the guerillas, the government is unable to protect the respondent. Some of those threats are from the government since they came on government letterhead, even though unsigned. The final straw is, just before his left, he was advised by a high government official, and his friend, that the government intended to kill selected student leaders and that he might be on the list. He and four others fled the country. And, in fact, he read in Los Angeles or in California after his arrival that one of the student leaders who remained in that country, in fact, was killed.

The efforts by the guerrillas was not recruitment as such, certainly not for military service. Their invitation that he, and his organization, join them was based upon political opinion and activities, not an invitation to join them because he was an able-bodied young soldier. That does constitute persecution. In short, he does have a genuine, real, subjective fear of persecution, injury and death if returns to Guatemala. And that fear is supported by objective evidence of record. That fear is based upon political opinion and political activities as a student leader.

The Government would have the Court find that the respondent is a criminal and that is the root of his problems. There is no evidence of Government investigations, charges, or prosecution of this respondent for such acts. All the threats and acts by the government, and/or guerrillas, and/or right wing government support groups were based upon political grounds.

Nor does the Court find that the respondent is a terrorist. No one was ever hurt. His acts were politically motivated. Most of their activities consisted of property damage, which of course, is illegal, but that does not make the respondent a terrorist in this case. The Court would further note that Guatemala is a very violent country with a long history of cruelty, civil strife, and human rights violations by the government, by right wing government support groups, and by the guerrillas. His activities and those of his fellow students must be viewed in this perspective.

The Court would finally note that while his fear of returning to Guatemala because the guerrillas might harm him if they found he was a reserve military person, of course is not itself a grounds for granting political asylum. That would be an occupational hazard. However, the Court, has previously said, does find a genuine fear based upon objective evidence of persecution because of political opinion and activities as a student leader. And, accordingly, he is statutorily eligible for asylum.

Asylum, of course, is a discretionary grant. In viewing all of the activities, to include the criminal acts of property damage and vandalism and perhaps assault connected therewith, the Court does believe that those are outweighed by the favorable factors of record and accordingly will grant political asylum as a matter of discretion.

As to withholding of deportation, that is mandatory if the Court does find there a clear probability that he would be persecuted if returned to Guatemala; for the same reasons, his activities as a student leader for

political opinions, the Court will also grant withholding of deportation.

ORDER

IT IS HEREBY ORDERED that the application for political asylum is granted.

IT IS FURTHER ORDERED that the application for withholding of deportation is granted.

IT IS FURTHER ORDERED that these deportation proceedings are terminated.

/s/ JOHN W. RICHARDSON
JOHN W. RICHARDSON
Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-70267
I&NS No. A70-815-341

JUAN ANIBAL AGUIRRE-AGUIRRE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed: Nov. 26, 1997]

ORDER

Before: PREGERSON, NOONAN and KLEINFELD, Circuit Judges

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judge Kleinfeld voted to grant the petition for rehearing. Judge Pregerson voted to reject the suggestion for rehearing en banc. Judge Noonan recommended rejection.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX E

STATUTORY PROVISION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, as codified at 8 U.S.C. 1253(h) (1994), provides as follows:

Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that —

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.